STATE OF MICHIGAN

COURT OF APPEALS

K & M REAL ESTATE, L.L.C., Plaintiff-Appellee, v RUBLOFF DEVELOPMENT GROUP, INC. and KM PORT HURON, L.L.C., Defendants-Appellants, and RUBY 07 PORTHURON, L.L.C., an Assignee of BMO HARRIS BANK, NA, f/k/a MCI MARSHALL & ISLEY Bank, and JCF REAL ESTATE, L.L.C., Intervenors-Appellants.	UNPUBLISHED March 18, 2014 Nos. 313892; 315479 St. Clair Circuit Court LC No. 11-002000-CK

Before: SERVITTO, P.J., and SAWYER and BOONSTRA, JJ.

PER CURIAM.

In these consolidated appeals, defendants and intervenors appeal as of right in Docket No. 313892 the November 28, 2012 judgment for plaintiff K & M Real Estate, LLC. In Docket No. 315479, defendants and intervenors appeal as of right the March 11, 2013 order regarding requisite repairs to certain real property. We reverse the judgment in Docket No. 313892; we vacate the order in Docket No. 315479.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

This case involves two adjacent parcels of commercial real property located in Fort Gratiot Township, and a covenant that requires the adjacent property owners to maintain their respective parking areas and roadways in a first-class condition. Plaintiff owns one parcel ("the Shopping Center Parcel"). Defendant KM Port Huron LLC ("KM Port Huron") owns the other parcel ("the K-Mart Parcel"), which is immediately south of and adjacent to the Shopping Center Parcel. Defendant Rubloff Development Group, Inc. ("Rubloff") leases a portion of the K-Mart Parcel from defendant KM Port Huron.

Prior to the two adjacent parcels being owned by plaintiff and KM Port Huron, respectively, they were under the common ownership of KM Port Huron Development Company ("KMPH Development").[1] In 1976, KMPH Development, which then was the sole owner of the two parcels, executed a document entitled Declaration and Agreement as to Easements ("Declaration and Agreement")[2] that, among other matters, requires the "Owner" of each parcel to maintain the parking areas and roadways located on each parcel in a "first-class condition." "Owner" is defined as KMPH Development. The Declaration and Agreement provides that the agreement is binding on the "Owner," as well as "its heirs, representatives, successors, and assigns." In addition to requiring maintenance of the parking areas and roadways in a first-class condition, the Declaration and Agreement provides that:

> [a]ny and all costs with regard to the maintenance of said parking areas and roadways shall be shared by the two parcels on a pro rata basis based on the square footage of the building area on the Shopping Center Parcel as it relates to the square footage of building on the K-Mart Parcel . . . .

Further, the Declaration and Agreement grants the "Owner of each parcel" a right of entry onto the other parcel "to perform any and all maintenance and repair which may be needed in order to keep said parking area in a first-class condition, free of debris and snow."

The instant action began when plaintiff sued defendants and alleged that the K-Mart Parcel was not being maintained in a first-class condition. Plaintiff sought an order from the trial court to compel defendants to comply with the terms of the Declaration and Agreement regarding the condition of the parking area on the K-Mart Parcel and to pay the costs of any repairs to the parcel. In the event that plaintiff exercised its right under the Declaration and Agreement to enter onto the K-Mart Parcel to make repairs, plaintiff sought a lien on the K-Mart Parcel for the amount of the repair cost.

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[1] The above-referenced lease, which currently is between defendant KM Port Huron (as lessor) and defendant Rubloff (as lessee), was originally entered into in 1975 between KMPH Development (as lessor) and S.S. Kresge Company ("Kresge") (as lessee). At some point in time, defendant KM Port Huron became the owner of the K-Mart Parcel and succeeded to the interests of KMPH Development (as lessor) under the lease. In 2002, defendant Rubloff entered into a Lease Assignment and Assumption Agreement under which Kresge's right, title and interest (as lessee) under the lease was assigned to defendant Rubloff. The record evidence does not indicate whether there is any affiliation or relationship among KMPH Development, defendant KM Port Huron, or defendant Rubloff.

[2] Although the document was entitled "Declaration and Agreement," the document appears to be a reservation of appurtenant easements on both parcels, and was recorded with the Register of Deeds. KMPH Development, as the owner in 1976 of both parcels, was entitled to reserve easements upon them prior to conveyance. See *Forge v Smith*, 458 Mich 198, 205; 580 NW2d 876 (1998). The parties do not generally dispute that the terms of the Declaration and Easement are enforceable.

Defendants responded, arguing that defendant Rubloff was not the owner of the K-Mart Parcel, and that any relief awarded to plaintiff should therefore not be granted against defendant Rubloff. Further, they argued that, pursuant to a pro rata cost-sharing provision in the Declaration and Agreement, defendant KM Port Huron and plaintiff should share the costs of repairs to the K-Mart Parcel.

While the action was pending, intervenor JCF Real Estate was appointed receiver of the K-Mart Parcel. Thereafter, JCF Real Estate and BMO Harris Bank, who had recorded a mortgage on the K-Mart Parcel in 2005, intervened as of right in this action. BMO Harris Bank subsequently assigned its rights to intervenor Ruby 07 Port-Huron LLC. Intervenors agreed that the parking area on the K-Mart Parcel had not been maintained in a first-class condition. They argued that any recovery for the cost of repairs should be directed to defendant Rubloff because of defendant Rubloff's alleged extensive participation in affairs related to the parking area. Intervenors also argued that, in the event plaintiff claimed a lien against the K-Mart Parcel in the amount of repairs performed on the property, such a lien should not have priority over the BMO Harris Bank mortgage, which was recorded in 2005.

Following a bench trial, the trial court entered an Opinion Following Trial on September 19, 2012, finding that the parking area on the K-Mart Parcel had not been maintained in a first-class condition. It also found that defendant Rubloff was jointly and severally obligated under the Declaration and Agreement to maintain and repair the parking lot on the K-Mart Parcel "as an assign" and as defendant KM Port Huron's "representative concerning the K-Mart Parcel, including the Parking Lot." Further, the trial court found that in the event defendants failed to restore the parking lot to a first-class condition, plaintiff was authorized under the Declaration and Agreement to enter onto the K-Mart Parcel to make repairs, in which case "Rubloff and KM Port Huron, [sic] must reimburse Plaintiff for the costs of restoring the parking lot." Further, if plaintiff was not reimbursed for those repairs, it was entitled to a judicial lien on the property that had priority over the recorded 2005 BMO Harris Bank mortgage. Finally, the trial court found that, although the Declaration and Agreement provided for the owners of the Shopping Center Parcel and K-Mart Parcel to share the costs of repairs to the parking areas, that provision had been waived by defendants' previous refusals to pay for repairs to the parking areas. On November 28, 2012, the trial court entered a judgment that incorporated the reasons set forth in its Opinion Following Trial, and that further provided that defendants KM Port Huron and Rubloff "shall be jointly and severally liable to reimburse Plaintiff 100% of any costs incurred by Plaintiff in repairing, restoring and/or maintaining the Parking Lot in first class condition."

II. STANDARD OF REVIEW

"Following a bench trial, this Court reviews the trial court's conclusions of law de novo, and its findings of fact for clear error." *Mettler Walloon, LLC v Melrose Twp*, 281 Mich App 184, 195; 761 NW2d 293 (2008). "A finding is clearly erroneous if panel members are left with a definite and firm conviction that a mistake has been made." *Id*. Resolution of this issue also requires us to interpret the Declaration and Agreement, which sets forth a covenant that runs with the land. Covenants that run with the land are contracts, *Terrien v Zwit*, 467 Mich 56, 71-72; 648 NW2d 602 (2002), and this Court reviews de novo the proper interpretation of a contract, *Alpha Capital Mgt, Inc v Rentenbach*, 287 Mich App 589, 611; 792 NW2d 344 (2010).

III. DEFENDANT RUBLOFF'S LIABILITY

The first issue defendants and intervenors raise on appeal is whether the trial court erred by concluding that, under the plain language of the Declaration and Agreement, defendant Rubloff is jointly and severally obligated with defendant KM Port Huron to maintain the parking areas on the K-Mart Parcel, and to reimburse plaintiff for all costs incurred by it in restoring the parking areas to first-class condition.

Initially, we reject plaintiff's contention that this issue is moot with regard to defendant Rubloff because defendants and intervenors have already completed repairs on the K-Mart Parcel parking areas. "An issue becomes moot when a subsequent event renders it impossible for the appellate court to fashion a remedy." *Kieta v Thomas M Cooley Law Sch*, 290 Mich App 144, 147; 799 NW2d 579 (2010). The responsibility to maintain the parking areas is set forth in the Declaration and Agreement. The interpretation of the Declaration and Agreement is not moot because it will continue to have consequences that may affect defendant Rubloff in the future. See *Hayford v Hayford*, 279 Mich App 324, 325; 760 NW2d 503 (2008). See also *Huntington Woods v Detroit*, 279 Mich App 603, 616; 761 NW2d 127 (2008) ("An actual controversy is deemed to exist in circumstances where declaratory relief is necessary in order to guide or direct future conduct.").

"The cardinal rule in the interpretation of contracts is to ascertain the intention of the parties." *Shay v Aldrich*, 487 Mich 648, 660; 790 NW2d 629 (2010) (quotation omitted). "An unambiguous contractual provision reflects the parties' intent as a matter of law, and '[i]f the language of the contract is unambiguous, we construe and enforce the contract as written.'" *Holland v Trinity Health Care Corp*, 287 Mich App 524, 527; 791 NW2d 724 (2010), quoting *Quality Prods & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 375; 666 NW2d 251 (2003). When a contractual term is undefined, this Court may look to a dictionary in order to ascertain the commonly used meaning of the term. *Citizens Ins Co v Pro-Seal Serv Group, Inc*, 477 Mich 75, 84; 730 NW2d 682 (2007).

The Declaration and Agreement provides that:

> The Owner of each parcel hereby agrees that so long as there is a building open to the public on each side of said parcels that the Owner of each said parcels agree[s] to maintain the parking areas and roadways located on each of said parcels in a first-class condition, free of debris and snow.

The Declaration and Agreement further provides that the agreement is binding "upon the Owner, its heirs, representatives, successors and assigns and shall be deemed a covenant running with the land." While the Declaration and Agreement defines "Owner" as KMPH Development (which at that time owned both parcels), the quoted language clearly binds not only KMPH Development, but also the successor owners of the two parcels, currently plaintiff and defendant KM Port Huron, as well as their respective heirs, representatives, successors or assigns.

The trial court found that defendant Rubloff was defendant KM Port Huron's representative with regard to the parking areas on the K-Mart Parcel.[3] We disagree. The term "representative" is not defined by the Declaration and Agreement. Black's Law Dictionary defines "representative" as "[o]ne who stands for or acts on behalf of another[.]" Black's Law Dictionary (9th ed). "Representative" has also been defined to mean "a person or thing that represents another or others[.]" *Random House Webster's College Dictionary* (1997).

The trial court found that the evidence demonstrated that defendant Rubloff acted on behalf of defendant KM Port Huron with regard to the K-Mart Parcel's parking areas. Specifically, the trial court based its holding on the following:

> The facts and testimony show that Rubloff has taken an active role in maintaining the parking lot. Rubloff leases the K-Mart Parcel from KM Port Huron and in turn subleases it to tenants. Rubloff has handled tenant complaints concerning the condition of the parking lot and applied for the site plan approval for the project, which was not successful. Mrs. Baldwin even testified that in regards to the project on the K-Mart Parcel, Rob Parks of Rubloff was her one contact. Until the appointment of the Receiver, Rubloff collected rents from tenants on the K-Mart Parcel. In addition, both Rubloff and KM Port Huron entered into a Release and Settlement Agreement with Plaintiff concerning money owed to Plaintiff for previous work performed by Plaintiff on the K-Mart Parcel. Rubloff paid Plaintiff $28,131.83 pursuant to that settlement agreement. Rubloff is responsible for all aspects of the K-Mart Parcel, such as construction, leasing, collecting rents and paying for maintenance. Therefore, this Court finds that Rubloff is KM Port Huron's representative concerning the K-Mart Parcel and is bound by the Declaration.

[3] In its Opinion Following Trial, the trial court makes fleeting reference to defendant Rubloff as an "assign" (presumably of defendant KM Port Huron). The bulk of the opinion, as well as the Judgment, make reference to defendant Rubloff as a representative, not an assign. In any event, if the trial court in fact intended to conclude that defendant Rubloff was an assign of defendant KM Port Huron, such a conclusion is erroneous. The term "assign" has been defined to mean "[t]o convey; to transfer rights or property[.]" Black's Law Dictionary (9th ed). An assignment meanwhile, means "[t]he transfer of rights or property[.]" Black's Law Dictionary (9th ed). Further, this Court has explained that in order for an assignment to occur, "there must be a perfected transaction between the parties which is intended to vest in the assignee a present right in the thing assigned." *Burkhardt v Bailey*, 260 Mich App 636, 654; 680 NW2d 453 (2004), quoting *Weston v Dowty*, 163 Mich App 238, 242; 414 NW2d 165 (1987). The key to an assignment is whether the assignor manifests an intent to presently transfer the thing to be assigned to the assignee. *Id*. at 654-655. No evidence on the record supports the conclusion that defendant KM Port Huron assigned or transferred any rights to defendant Rubloff.

However, evidence presented at trial did not support this conclusion. For example, with regards to the construction project, Jorja Baldwin, the zoning administrator for Fort Gratiot Township, testified that she dealt primarily with Rubloff Construction, not defendant Rubloff, in the permit application process. Correspondence from Baldwin regarding the project is addressed to Robert Parks at Rubloff Construction. Although the permit application indicates an address for the owner listed as "KM Port Huron, L.L.C., care of Rubloff Development" the record is otherwise devoid of any evidence that defendant Rubloff was involved in the permit application process. Further, although defendant Rubloff, which had been named as a defendant in a previous lawsuit between plaintiff and defendant KM Port Huron regarding parking area repairs, issued a settlement check to plaintiff in that case, the settlement agreement only obligated KM Port Huron (not defendant Rubloff). Plaintiff's representative agreed in this case that plaintiff did not know what the agreement was between defendants regarding the issuance of that settlement check. Defendant Rubloff was not obligated to make any payment under the settlement agreement, and no evidence was presented concerning why defendant Rubloff undertook to pay defendant KM Port Huron's debt. Finally, the fact that defendant Rubloff responded to one complaint of a subtenant regarding the parking lot, involving such issues as snow, the placement of a cart corral, the placement of a construction fence, and available parking spaces, is a far cry from defendant Rubloff assuming an "active role" as defendant KM Port Huron's representative regarding the KM Parcel's parking lot.

The trial court appears to have concluded that defendant Rubloff's responsibilities as a lessee and landlord to subtenants equated to responsibility over the parking lot as a representative of defendant KM Port Huron, even when many of those duties did not involve the parking lot at issue. For example, the fact that defendant Rubloff collected rents from its subtenants has no bearing on whether it bears responsibility for parking lot repairs under the Declaration and Agreement. Further, the trial court appears to have conflated similarly-named legal entities. Absent evidence of some abuse of the corporate form, separate corporate entities should be respected. *Seasword v Hilti, Inc*, 449 Mich 542, 547; 537 NW2d 221 (1995). The corporate veil may be pierced if a corporation is a "mere instrumentality" of another corporation. *Id*., quoting *Maki v Copper Range Co*, 121 Mich App 518, 524; 328 NW2d 430 (1982). No evidence exists in the record to support piercing the corporate veil in this case.

We therefore hold that the trial court erred in finding that defendant Rubloff acted on behalf of defendant KM Port Huron with regard to the K-Mart Parcel's parking areas, or was defendant KM Port Huron's representative under the Declaration and Agreement. Accordingly, we reverse the trial court's judgment insofar as it relates to the liabilities or obligations of defendant Rubloff.[4]

[4] We further note that it is far from clear, even if the evidence were to support a finding that defendant Rubloff were a "representative" of defendant KM Port Huron bound by the Declaration and Agreement, that such representation equates to joint and several liability for the cost of repairs. Although a representative of KM Port Huron may share its duty to maintain the parking lot, the Declaration and Agreement does not speak to the apportionment of liability (for the cost of repairs) between an owner and an owner's representative. An agent is not generally

IV. WAIVER OF PRO RATA COST SHARING PROVISION

Defendants and intervenors next argue that the trial court erred by ignoring the pro-rata sharing provision of the Declaration and Agreement and by failing to require plaintiff to be responsible for part of the cost of repairs on the K-Mart Parcel. The trial court found that defendants waived the cost-sharing provision of the Declaration and Agreement by failing to contribute to repairs performed on the parking area of the Shopping Center Parcel. We review de novo the interpretation of the agreement, *Alpha Capital Mgt, Inc*, 287 Mich App at 611, and reverse the trial court.

In pertinent part, the Declaration and Agreement provides that:

> Any and all costs with regard to the maintenance of said parking areas and roadways shall be shared by the two parcels on a pro rata basis based on the square footage of the building area on the Shopping Center Parcel as it relates to the square footage of building on the K-Mart Parcel which, for purposes hereof, is set at 84,180 square feet.

"[P]arties are at liberty to design their own guidelines for modification or waiver of the rights and duties established by the contract . . . ." *Quality Prods & Concepts Co*, 469 Mich at 372. "However, the freedom to contract does not authorize a party to *unilaterally* alter an existing bilateral agreement. Rather, a party alleging waiver or modification must establish a mutual intention of the parties to waive or modify the original contract." *Id*. (emphasis in original). Where there is no mutual assent for a modification or waiver, there can be no modification or waiver. *Id*. at 372-373. The mutuality requirement is satisfied where a modification is established through clear and convincing evidence of a written agreement, oral agreement, or affirmative conduct establishing mutual agreement to waive the terms of the original contract." *Id*. at 373. Here, the trial court found waiver by the parties' course of conduct.[5]

Regardless of whether there was mutual assent to waive the pro rata cost-sharing provision in this case, the trial court erred in finding that the parties modified or waived the Declaration and Agreement because their waiver or modification was not in writing. MCL 566.106 provides that certain types of contracts involving interests in land must be in writing. The Declaration and Agreement concerns easements and covenants, both of which involve an interest in land. See *Terrien*, 467 Mich at 71-72; *Zaher v Miotke*, 300 Mich App 132, 140; 832 NW2d 266 (2013). Accordingly, the Declaration and Easement was required to be in writing. MCL 566.106. Because the original contract was required to be in writing, any modification of the contract also had to be in writing in order to be enforceable. *Zurcher v*

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liable for its acts on behalf of the principal if the agent acts within the scope of its authority, unless the agent has expressly agreed to assume liability. *Hall v Encyclopaedia Britannica, Inc*, 325 Mich 35; 38; 37 NW2d 702 (1949).

[5] The trial court's further held that notwithstanding its finding of waiver (which we reverse), the waiver did not negate plaintiff's obligation to contribute to *future* repair expenses. This conclusion further undercuts the trial court's finding of waiver.

Herveat, 238 Mich App 267, 299-300; 605 NW2d 329 (1999). Therefore, in this case, the parties could not waive the cost-sharing provision by a course of conduct. Instead, any waiver was required to be in writing. *Id*. As such, the trial court's finding of waiver was erroneous, and the cost-sharing provision of the Declaration and Agreement must be enforced as written. *Coates v Bastian Bros, Inc*, 276 Mich App 498, 503; 741 NW2d 539 (2007) (a reviewing court must enforce the unambiguous language of a contract as written). We accordingly reverse the portion of the trial court's judgment finding a waiver of the cost-sharing provision.

V. JUDICIAL LIEN

Next, defendants and intervenors argue that the trial court erred by ordering that, in the event plaintiff entered the K-Mart Parcel to perform repairs and was not reimbursed for the costs of those repairs, it was entitled to a judicial lien on the K-Mart Parcel that had priority over the 2005 BMO Harris Bank mortgage. "Whether a lien is authorized in a particular case is a question of law. We review questions of law de novo." *Ypsilanti Charter Twp v Kircher*, 281 Mich App 251, 281; 761 NW2d 761 (2008). We agree that the trial court erred in interpreting the Declaration and Agreement to provide for the imposition of a lien on real property.

"The courts may not impose a lien on real property absent an express agreement of the parties or other legal authority." *Id*. "An intent to create a lien may not be inferred from ambiguous language of a contract. Rather, such intent must clearly appear" within the contract. *Wiltse v Schaeffer*, 327 Mich 272, 282; 42 NW2d 91 (1950). Indeed, "[i]t may be assumed that if the parties to the agreement had intended to provide for a lien they would have done so in clear and unambiguous terms." *Id*. at 284.

Plaintiff argues that the following passage of the Declaration and Agreement provides for the creation of a lien in the event that one property owner performs repairs on land belonging to the other property owner:

> Any and all costs with regard to the maintenance of said parking areas and roadways shall be shared by the two parcels on a pro rata basis . . . The Owner of each parcel is hereby granted an easement and right of entry on each respective parcel in order to perform any and all maintenance and repair[s] which may be needed in order to keep said parking area in a first-class condition, free of debris and snow.

We disagree, and hold that the trial court erred by concluding that plaintiff was entitled to a first-priority lien, because the express language of the Declaration and Agreement does not provide for the creation of a lien. "An intent to create a lien may not be inferred from ambiguous language of a contract." *Wiltse*, 327 Mich at 282. The language cited by plaintiff does not expressly state that a party may obtain a lien against a parcel. It is unclear what, if any, significance should attach to the use of the word "parcels" instead of "owners" with regard to the cost-sharing provision of the Declaration and Agreement. To interpret such phrasing to mean that the Declaration and Agreement creates the right to obtain a lien on either parcel is contrary to established case law regarding the creation of liens by contractual agreement. *Id*. at 284 ("It may be assumed that if the parties to the agreement had intended to provide for a lien they would have done so in clear and unambiguous terms."). See also *Ypsilanti Charter Twp*, 281 Mich App

at 282 (a lien may not be imposed on real property "absent an express agreement of the parties . . . ."). We will not read into the Declaration and Agreement a provision granting a lien when the express language of the agreement does not do so. *Smith v Smith*, 292 Mich App 699, 702; 823 NW2d 114 (2011) (internal quotation omitted) ("[C]ourts may not change or rewrite plain and unambiguous language in a contract under the guise of interpretation because the parties must live by the words of their agreement."). Thus, we reverse the part of the trial court's judgment that provided for the creation of a first-priority lien based on the Declaration and Agreement.

We note, however, that although the express language of the Declaration and Agreement does not create a lien, plaintiff could obtain a judgment for the amount owed for repairs pursuant to the cost-saving provision, and then execute on that judgment. *Thomas v Dutkavich*, 290 Mich App 393, 414; 803 NW2d 352 (2010); *Ypsilanti Charter Twp*, 281 Mich App at 285 n 13. A lien obtained through this process would arise by operation of the Revised Judicature Act, MCL 600.6001 *et seq*. See *Thomas*, 290 Mich App at 414. However, such a lien would not have priority over the BMO Harris Bank mortgage, which was recorded in 2005. See *Stocker v Tri-Mount/Bay Harbor Bldg Co, Inc*, 268 Mich App 194, 199-200; 706 NW2d 787 (2005) (holding that a prior recorded mortgage has priority over a subsequently recorded lien). Indeed, such a lien would not arise until after levy and execution on the judgment, which would necessarily occur after 2005.

VI. MARCH 11, 2013 ORDER

Although defendants and intervenors claim an appeal from the order of the trial court issued on March 11, 2013 in Docket No. 315479, their brief on appeal does not address any issues related to that order. However, the order reiterates the trial court's conclusion that defendant Rubloff is a "representative" of defendant KM Port Huron. The order also orders defendants to pay a sum of $346,389 for parking lot repairs, and to place those funds in escrow. Finally, the order does not provide for any pro rata sharing of costs by plaintiff. The issuance of this postjudgment order is thus affected by our reversal in Docket No. 313892. See MCR 2.621(A)(2) (enabling a party to obtain relief supplementary to a money judgment). Because we reverse relevant portions of the judgment, the March 11, 2013 order of the trial court must be vacated as well. See MCR 7.216(A)(7).

VII. CONCLUSION

In Docket No. 313892, the November 28, 2012 judgment of the trial court is reversed insofar as it relates to (a) the liabilities or obligations of defendant Rubloff (b) waiver of the pro-rata cost sharing provision; and (c) creation of a lien on real property. In Docket No. 315479, we vacate the March 11, 2013 order of the trial court in light of our decision concerning the judgment.

/s/ Deborah A. Servitto
/s/ David H. Sawyer
/s/ Mark T. Boonstra